(19,327.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 245.

AH SIN, PLAINTIFF IN ERROR,

vs.

GEORGE W. WITTMAN, AS CHIEF OF POLICE OF THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA.

IN ERROR TO THE SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 8, 1904.

a In the Supreme Court of the United States.

AH SIN, Plaintiff in Error,
vs.
GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the superior court in and for the city and county of San Francisco, State of California, and to the judge thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a suit and plea in the superior court in and for the city and county of San Francisco, State of California, and before you, being the highest court of the said State in which a decision could be had in the said suit and entitled "In the matter of the petition of Ah Sin for the writ of *habeas corpus*," being case number 15198 in said superior court and wherein was drawn in question the validity of a certain authority and a certain municipal ordinance of the city and county of San Francisco, State of California, on the ground of their being repugnant to the Constitution, treaty and laws of the United States, and the decision of the said superior court was in favor of such, their validity; and wherein also was drawn in question the construction of a clause of the Constitution of the United States and of a treaty of the United States with the Empire of
b China, and the decision of the said superior court was against the title, right, privilege and exemption specially set up and claimed under such clause of the said Constitution, and under the said treaty with the Empire of China, a manifest error hath happened, to the great damage of the said Ah Sia, (a subject of the Emperor of China) as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 7th day of June A. D. 1904, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Seal U. S. Circuit Court, Northern Dist. Cal.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 9th day of April in the year of our Lord one thousand nine hundred and four.

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

Allowed by—

WILLIAM P. LAWLOR,
Judge of the Superior Court.
FRANK H. KERRIGAN,
Presiding Judge of said Superior Court.

c *Certificate.*

It is hereby certified that Ah Sin the plaintiff in error, did lodge in the office of the clerk of the superior court in and for the city and county of San Francisco, State of California, on the 9th day of April A. D. 1904, a true copy of the foregoing writ of error, for the defendant in error.

[Seal Superior Court, City & County of San Francisco, Cal.]

JOHN J. GREIF,
Clerk of the Superior Court in and for the City and County of San Francisco, State of California,
By JOSEPH RIORDAN,
Deputy County Clerk and Ex-officio Deputy Clerk of the Superior Court.

d [Endorsed:] No. 15,198. Dep't 11. In the Supreme Court of the United States. Ah Sin, plaintiff in error, *vs.* George W. Wittman, as chief of police, etc., defendant in error. Writ of error and certificate of lodgment. Filed Apr. 9, 1904. John J. Greif, clerk, by Joseph Riordan, deputy clerk. George D. Collins, 21–22 Crocker bldg., San Francisco, Cal., attorney for plaintiff in error. R. 11–6–50.

1 In the Supreme Court of the United States of America.

AH SIN, Plaintiff in Error,
vs.
GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California, Defendant in Error.

Transcript of Record.

Error to the superior court in and for the city and county of San Francisco, State of California.

Superior Court in and for the City and County of San Francisco, State of California, *ss:*

Return to Writ of Error.

The answer of the superior court in and for the city and county of San Francisco, State of California.

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our superior court in and for the city and county of San Francisco, State of California, within mentioned, at the day and place within contained, as we are commanded by the annexed writ of error.

By the court,

[Seal Superior Court, City & County of San Francisco, Cal.]

JOHN J. GREIF,
Clerk of the Superior Court in and for the City and County of San Francisco, State of California,
By THOMAS L. DORAN,
Deputy Clerk.

2 In the Supreme Court of the United States.

AH SIN, Plaintiff in Error,
vs.
GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California, Defendant in Error.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to George W. Wittman, as chief of police of the city and county of San Francisco, State of California, Greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States to be holden at the city of Washington,

in the District of Columbia, on the 7th day of June A. D. 1904, pursuant to a writ of error lodged in the clerk's office of the superior court in and for the city and county of San Francisco, State of California, wherein Ah Sin is the plaintiff in error, and you are the defendant in error, to show cause if any there be, why the final judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William P. Lawlor, judge of the superior court in and for the city and county of San Francisco, State of California, this 9th day of April A. D. 1904, at the city and
3 county of San Francisco, State of California, and the Honorable Frank H. Kerrigan, presiding judge of the said superior court.

(Signed) WM. P. LAWLOR,
Judge of the Superior Court in and for the City and County of San Francisco, State of California.

(Signed) FRANK H. KERRIGAN,
Presiding Judge of said Superior Court.

This is to certify that on the 9th day of April A. D. 1904, the foregoing citation was served upon the undersigned by delivery of a true copy thereof to him, and admission of said service is hereby made.

(Signed) LEWIS F. BYINGTON,
District Attorney of the City and County of San Francisco, Attorney for the Defendant in Error, George W. Wittman, as Chief of Police of said City and County of San Francisco.

Endorsed: Filed April 9th, 1904. John J. Greif, clerk. By Joseph Riordan, deputy clerk.

4 In the Superior Court in and for the City and County of San Francisco, State of California.

AH SIN, Plaintiff in Error,
vs.
GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California, Defendant in Error.

Assignment of Errors.

Of October term, in the year of our Lord one thousand nine hundred and three.

Afterwards to wit: on the 9th day of April A. D. 1904, in the same term, before the justices of the Supreme Court of the United States, comes the said Ah Sin, by George D. Collins, his counsel, and

says that in the record and proceedings in the matter of the petition of Ah Sin for a writ of *habeas corpus* No. 15198 in the superior court in and for the city and county of San Francisco, State of California, there is manifest error in this, to wit:

1. That the said superior court committed manifest error in said cause in deciding therein that the said plaintiff in error, the said Ah Sin is not deprived of his liberty without due process of law, in violation of section 1 of the fourteenth amendment of the Constitution of the United States.

2. That the said superior court committed manifest error
5 in said cause in deciding therein that the said plaintiff in error is not denied the equal protection of the laws of the State of California, in violation of section 1 of the fourteenth amendment of the Constitution of the United States.

3. That the said superior court committed manifest error in the said cause in deciding therein that the municipal ordinance of the city and county of San Francisco, set forth in the petition for the writ of *habeas corpus* herein, is not in conflict with section 1 of the fourteenth amendment of the Constitution of the United States, and does not deprive the said plaintiff in error of his liberty without due process of law.

4. That the said superior court committed manifest error in the said cause in deciding therein that the said municipal ordinance of the said city and county of San Francisco does not deprive the said plaintiff in error of the equal protection of the laws.

5. That the said superior court committed manifest error in the said cause in deciding therein that the said plaintiff in error is not imprisoned in violation of section 1 of the fourteenth amendment of the Constitution of the United States.

6. That the said superior court committed manifest error in the said cause in deciding therein that the said municipal ordinance is not void because unauthorized by the police power of the State.

7. That the said superior court committed manifest error in the said cause in deciding therein that the said municipal ordinance is not in contravention of the treaty existing between the United States and the Empire of China.

8. That the said superior court committed manifest error in the said cause in deciding therein that the said plaintiff in error is not imprisoned in violation of the treaty now existing between
6 the United States and the Empire of China.

9. That the said judgment of the said superior court in the said cause operates to deprive the said plaintiff in error of his liberty without due process of law, in violation of the Constitution of the United States, to wit: section 1 of the fourteenth amendment.

10. That the said judgment of the said superior court in said cause operates to deny to the said plaintiff in error the equal protection of the laws, in violation of the Constitution of the United States, to wit: section 1 of the fourteenth amendment.

Whereas by the law of the land, said judgment of the superior

court in and for the city and county of San Francisco, State of California, ought to have been given for the said Ah Sin, plaintiff in error, and against the said George W. Wittman, chief of police of the city and county of San Francisco, State of California, defendant in error; and the said plaintiff in error, the said Ah Sin, prays that the said judgment of the superior court in and for the city and county of San Francisco, State of California, be reversed, annulled, and altogether held for naught, and that he be restored to all things which he hath lost by occasion of the said judgment.

(Signed) GEORGE D. COLLINS,
Attorney for Ah Sin, Plaintiff in Error.

Endorsed: Filed April 9, 1904. John J. Greif, clerk. By Joseph Riordan, deputy clerk.

7 In the Superior Court in and for the City and County of San Francisco, State of California.

In the Matter of the Petition of AH SIN for the Writ of *Habeas Corpus.*

Petition.

To the honorable the superior court in and for the city and county of San Francisco, State of California:

Comes now Ah Sin, a subject of the Emperor of China, and complains to your honorable court that he is unlawfully imprisoned and restrained of his liberty by George W. Wittman, Esq., chief of police of the city and county of San Francisco, State of California, who is a citizen of the United States and a resident and inhabitant of the northern district of California. That said imprisonment is in the hall of justice in the said city and county of San Francisco and is unlawful in that the same is in violation of section one of the fourteenth amendment of the Constitution of the United States in this:

That said imprisonment is upon and in obedience to a certain municipal ordinance of the said city and county of San Francisco, a copy of which ordinance is hereinafter set forth. That the said ordinance is void and in conflict with the Constitution of the United States in that it operates to deprive your petitioner of his liberty without due process of law and also denies to him the equal protection of the laws, as is hereinafter more fully specified.

Your petitioner avers that the said imprisonment is upon
8 a certain complaint filed in the police court of the said city and county of San Francisco; that the following is a true copy of said complaint viz:

"In the Police Court of the City and County of San Francisco, State of California, Department No. 4.

"THE PEOPLE OF THE STATE OF CALIFORNIA
"vs.
"AH SIN.

"STATE OF CALIFORNIA,
"*City and County of San Francisco,* } ss:

"Personally appears before me this 30th day of January A. D. "1904, J. L. Farrell who on oath makes complaint, and deposes and "says, that on the 25th day of January A. D. 1904 in the city and "county of San Francisco, State of California, the crime of misde- "meanor, to wit: was committed by Ah Sin (whose real name is "unknown to this complainant) who then and there within the "limits of the city and county of San Francisco, did willfully and "unlawfully visit and resort to a certain barred and barricaded "house and room at No. 820 Washington street, said house and "room being built and protected in a manner to make it difficult of "access and ingress to police officers; dice, cards, dominoes, fan tan, "tables and lay outs, and other gambling implements being then "and there exhibited and exposed to view and more than three "persons being then present in said barred and barricaded house and "room. Thereby violating the provisions of section- 2 and
9 "3 of order No. 937 bill 944 of the board of supervisors of "said city and county, contrary to the form, force and effect "of the statute in such cases made and provided, and against the "peace and dignity of the people of the State of California. And "this complainant, upon oath, accuses the said Ah Sin (whose real "name is unknown to this complainant), of having committed the "said crime, and this complainant further alleges and deposes that "the said accused was then and there arrested therefor in the act- "ual commission of said offence, and prays that the said accused "may be brought before a magistrate and dealt with according to "law.

"(Signed) JOHN L. FARRELL,
"*Police Officer.*

"Subscribed and sworn to before me this 30th day of January "A. D. 1904.

"(Signed) GEORGE H. CABANISS,
"*Judge of the Police Court of the City and*
"*County of San Francisco.*

"(Endorsed:) Filed in open court Jan. 30, 1904, John J. Greif, "clerk, by Bernard Conlon, deputy clerk."

That after a trial had by the said police court upon the said complaint, and on proof uncontradicted and unimpeached that the premises therein described, to wit: said house and room, were barred and barricaded and protected only against such police officers as had no right to enter said premises, and who were mere trespassers, your petitioner was adjudged guilty by said police court of being a visitor to said premises, to wit: said house or room, although he visited the same innocently and for a lawful purpose, and without any knowledge that the same were barred or barricaded or built or protected in a manner to make it difficult of access or ingress to police officers, and without any knowledge that there *was* exhibited or exposed to view on said premises, any cards, dice, dominoes, fan tan table, or layout, or any gambling implements whatsoever. That the following is a true copy of said ordinance, viz:

"*Bill No.* 944.

"Ordinance No. 937.

"Prohibiting the exposure of gambling tables or implements in a "room barred or barricaded or protected in any manner to make "it difficult of access or ingress to police officers, when three or "more persons are present; or the visiting of a room barred and barricaded or protected in any manner to make it difficult of access "or ingress to police, in which gambling tables or implements "are exhibited or exposed, when three or more persons are "present.

"Be it ordained by the people of the city and county of San "Francisco as follows:

"SECTION 1. It shall be unlawful for any person within the limits "of the city and county of San Francisco to exhibit or expose to "view in any barred or barricaded house or room, or in any place "built or protected in a manner to make it difficult of access or "ingress to police officers when three or more persons are present, "any cards, dice, dominoes, fan-tan table or layout, or any part of "such layout, or any gambling implements whatsoever.

"SECTION 2. It shall be unlawful for any person within the limits "of the city and county of San Francisco to visit or resort to any "such barred or barricaded house or room or other place built or "protected in a manner to make it difficult of access or ingress to "police officers, where any cards, dice, dominoes, fan-tan table or "layout, or any part of such layout, or any gambling implements "whatsoever are exhibited or exposed to view when three or more "persons are present.

"SECTION 3. Every person who shall violate any of the provisions of this ordinance shall be deemed guilty of misdemeanor, and upon conviction thereof shall be punished by a fine "not to exceed five hundred ($500.00) dollars, or by imprisonment

"in the county jail for not more than six (6) months, or by both "such fine and imprisonment.

"SECTION 4. This ordinance shall take effect and be in force on "and after its passage."

1. Your petitioner further avers that said ordinance and the provisions thereof are enforced and executed by the said municipality of San Francisco, and said State of California, solely and exclusively against persons of the Chinese race and not otherwise; and in that respect the said Chinese persons are thereby denied the equal protection of the laws, the said State of California thereby violating section one of the fourteenth amendment of the Constitution of the United States. Your petitioner avers, that said ordinance unjustly and arbitrarily discriminates in favor of certain visitors and also in favor of certain persons resorting to the house, room or place referred to in said ordinance as well as in favor of such persons and visitors as resort to or visit such house or room or place when not barred or barricaded or protected in a manner to make the same difficult of access or ingress to police officers, and is in that respect also in violation of the fourteenth amendment of the Constitution of the United States in thereby denying to your petitioner the equal protection of the laws. Your petitioner avers that he has applied to both the United States circuit and district court in and for the northern district of California, for a writ of *habeas corpus* and the said courts denied the writ, upon the sole and only ground that your
12 petitioner's remedy is by petition for the writ of *habeas corpus* to the State court of competent jurisdiction and in the event that relief is there denied, by writ of error from the Supreme Court of the United States; and in support of said proposition the following authorities are cited by said circuit court, viz:

Ex parte Royall 117 U. S. 241;
Ex parte Fonda, 117 U. S. 516;
In re Frederick, 149 U. S. 70;
Pepke *vs.* Cronan, 155 U. S. 100;
Bergeman *vs.* Backer, 157 U. S. 655;
Whitten *vs.* Tomlinson, 160 U. S. 231;
Baker *vs.* Grice, 169 U. S. 284;
Markuson *vs.* Boucher, 175 U. S. 184.

And the following authorities are cited by the said district court, viz:

Pepke *vs.* Cronan, 155 U. S. 100;
Markuson *vs.*.Boucher, 175 U. S. 184.

Your petitioner further avers that upon the hearing and trial of his said case upon said complaint on file in the said police court he made his motion in and before the said police court that the said criminal action and said criminal charge be dismissed upon the grounds that said municipal ordinance is null and void and in con-

flict with section one of the fourteenth amendment of the Constitution of the United States in that by said ordinance and also by its enforcement, your petitioner is deprived of his liberty without due process of law and in the same particulars as in this petition set forth; and is by said ordinance and its enforcement, denied the equal protection of the laws, and in the same particulars as
13 in this petition alleged. That after argument, the said motion and objections of your petitioner were overruled by the said police court; to which ruling and decision, your petitioner then and there duly excepted. That thereupon, the said police court adjudged your petitioner guilty of violating the said ordinance, as is hereinbefore alleged.

2. Your petitioner avers that by the provisions of the said ordinance he is deprived of his liberty to visit or resort to the premises described in the said complaint, or to any place or premises in the city and county of San Francisco that may be barred or barricaded or protected against police officers who have no right to enter such premises, merely because said premises are so barred or barricaded or protected and there are exhibited or exposed in the presence of three or more persons *other than your petitioner*, the articles specified in said ordinance, although your petitioner had nothing whatever to do with the barring or barricading or protecting of the premises or the exhibiting or exposing of any of the said articles, nor any knowledge when he visited the premises that they were barred or barricaded or protected against police officers nor that any of said articles was exhibited upon the premises or in the presence of three or more persons. That your petitioner is not charged with illegal or any gambling nor does said ordinance provide for the suppression or punishment of illegal or any other kind of gambling, nor does said ordinance prohibit the visiting of a gambling house. That there is an ordinance of the said city and county of San Francisco known and designated as sub-division 3 of section 33 of order No. 1587, and which is as follows, viz:

"It shall be unlawful for any person to keep or maintain, or visit,
"or in any manner contribute to the support of any house or
14 "place for the purpose of gambling or knowingly let or under-
"let or transfer the possession of any house or premises for "use by any person for said purpose. Every person who shall vio- "late any of the provisions of sub-divisions of this section shall be "deemed guilty of a misdemeanor and shall be punished by a fine "of not more than $500 or imprisonment not more than six months
"or by both such fine or imprisonment."

That your petitioner is not charged with violating nor convicted of violating said last mentioned ordinance; and he quotes said ordinance for the purpose of showing to your honorable court that he is not accused or convicted of visiting or resorting to either a gambling house or a house or place "for the purpose of gambling." Your petitioner further avers that the said ordinance to the extent that the same makes punishable the mere act of *visiting* a house or

room barred or barricaded, built or protected "in a manner to make "it difficult of access or ingress to police officers, where any cards, "dice, dominoes, fan-tan table or layout, or any part of such layout, "or any gambling implements whatsoever are exhibited or exposed "to view when three or more persons are present," is unconstitutional in that *it has no legitimate nor any relation to nor connection with the regulation or the prohibition or the suppression or the punishment of gambling.* and is not therefore within the authority of the State nor of the municipality of San Francisco in the lawful exercise of the police power; that it is an entirely arbitrary exertion of the powers of government and a violation of the fourteenth amendment of the Constitution of the United States, because not susceptible of being upheld as a lawful application of the police power of the State. Your
15 petitioner avers that the State has no power to make criminal, an innocent visit to a house or room where there is no gambling and where the visitor has nothing whatever to do with the ownership or possession or exhibition of any of the articles specified by the ordinance in question. That it is the constitutional right of your petitioner in the enjoyment of his liberty to visit any house or room where he can lawfully obtain admission and where he goes for a lawful purpose, and while there commits no unlawful act; that even if it can be made criminal to bar or barricade or protect the house or room against all police officers, and exhibit therein in the presence of three or more persons any of the articles specified in the said ordinance, no such ordinance is a valid or constitutional exercise or exertion of the police power of the State if it makes criminal *the mere act of innocently visiting such a house or room where the visitor had no knowledge or notice of and nothing whatever to do with the barring or barricading of the premises or the proscribed articles.* Your petitioner avers that the said ordinance is also void for the reason that it embraces more than one subject, in violation of section 11 of art. 2 of the charter of the city and county of San Francisco, and the subject of the ordinance is not expressed in its title. Your petitioner respectfully represents that any imprisonment under a void municipal ordinance is a deprivation of your petitioner's liberty, without due process of law, in violation of the fourteenth amendment of the Constitution of the United States and properly justiciable upon the writ of *habeas corpus.* Your petitioner avers that by said ordinance he is deprived of his liberty without due process of law in that he is prohibited thereby from visiting innocently
16 and for a lawful purpose, the house or room or place mentioned in said ordinance.

Your petitioner alleges that at all the times in this petition referred to, he was, ever since has been, and now is a subject of the Emperor of China, and was at all said times and ever since has been and now is within the jurisdiction of the State of California. That said ordinance is not only in conflict with section one of the fourteenth amendment of the Constitution of the United States but is

also in contravention of the treaty now existing between the United States and the Empire of China.

Wherefore your petitioner prays that he be granted the writ of *habeas corpus;* that the same be directed to George W. Wittman, Esq., the chief of police of the said city and county of San Francisco and returnable before your honorable court, at a time and place designated; that said imprisonment be adjudged unlawful and in violation of the fourteenth amendment of the Constitution of the United States, and that your petitioner be discharged therefrom and restored to his liberty; that pending the determination of this case, your petitioner be admitted to bail.

(Signed) AH SIN, *Petitioner.*

(Signed) GEORGE D. COLLINS,
Attorney for Petitioner.

17 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Ah Sin being duly sworn deposes and says that he is the petitioner herein; that he has heard read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information or belief; that as to those matters, he believes it to be true.

(Signed) AH SIN.

Subscribed and sworn to before me this 21st day of March, A. D. 1904.

[SEAL.] (Signed) JULIUS CALMANN,
Notary Public in and for the City and County of San Francisco, State of California.

18 In the Superior Court in and for the City and County of San Francisco, State of California.

In the Matter of the Petition of AH SIN for the Writ of *Habeas Corpus.*

Order Granting Writ of Habeas Corpus.

Upon the foregoing petition it is ordered that the writ of *habeas corpus* issue as therein prayed for and returnable before department No. 11 of the said superior court at the court room thereof in the said city and county of San Francisco, on the 22nd day of March, A. D. 1904, at ten o'clock a. m. on that day. It is ordered that in the meantime and until the final determination of said proceedings on

habeas corpus, the petitioner be and he is hereby admitted to bail in the sum of ten ($10.00) dollars.

Done in open court this 21st day of March A. D. 1904.

(Signed) FRANK H. KERRIGAN,
Presiding Judge of said Superior Court.

Endorsed: Filed Mar. 21, 1904. John J. Greif, clerk. By Thos. L. Doran, deputy clerk.

19 *Writ of Habeas Corpus.*

Superior Court, City and County of San Francisco, State of California, Department No. 11.

The people of the State of California to George W. Wittman, chief of police of San Francisco, Greeting:

We command you that you have the body of Ah Sin by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said Ah Sin shall be called, or charged, before department number eleven of our said superior court, at the court-room thereof in the hall of justice in the city and county of San Francisco, State of California, on the 22d day of March A. D. 1904, at ten o'clock in the forenoon of that day, to do and receive what shall then and there be said concerning the said Ah Sin, and have you then and there this writ. In the meantime the said Ah Sin is admitted to bail in the sum of ten dollars.

Witness: Hon. Frank H. Kerrigan, presiding judge of our said superior court, this 21st day of March 1904.

[Seal of said Superior Court.]

(Signed) JOHN J. GRIEF, *Clerk*,
(Signed) By THOMAS L. DORAN,
Deputy Clerk.

Endorsed: Filed in open court March 22, 1904. John J. Grief, clerk, by J. B. Martin, deputy clerk.

20 *Judgment and Order Dismissing Writ and Remanding Prisoner.*

In the Superior Court in and for the City and County of San Francisco, State of California.

Ex Parte AH SIN on *Habeas Corpus*. 15198.

This matter came on regularly for hearing this 28th day of March A. D. 1904, the petitioner being represented by his counsel and the

people being represented by the district attorney; whereupon it was stipulated and agreed in open court by counsel for the people and by counsel for the petitioner that the facts are, as set forth in the petition on file herein for the writ of *habeas corpus*. The cause was then argued by counsel on the points stated in the said petition and was thereupon submitted to the court for its decision and judgment; and the court being fully advised in the matter does now upon the authority of the matter of Ah Cheung 136 Cal. 678, dismiss the writ of *habeas corpus* heretofore issued herein and remand the petitioner to the custody of the chief of police of the city and county of San Francisco. Ordered accordingly. The petitioner reserved an exception to the judgment.

Done in open court this 28th day of March, A. D. 1904.

(Signed) WILLIAM P. LAWLOR,
Judge of said Superior Court.

Endorsed: Filed in open court, Mar. 29, 1904. John J. Greif, clerk. By J. B. Martin, deputy clerk.

21 In the Superior Court in and for the City and County of San Francisco, State of California.

AH SIN, Plaintiff in Error,
vs.
GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents that we the undersigned residents of the city and county of San Francisco, State of California, are held and firmly bound unto George W. Wittman as chief of police of the city and county of San Francisco, State of California, in the penal sum of two hundred dollars to be paid to the said George W. Wittman, for the payment of which well and truly to be made we bind ourselves, our executors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of April in the year of our Lord one thousand nine hundred and four.

The condition of this obligation is such that whereas the said Ah Sin has sued out a writ of error from the Supreme Court of the United States to the superior court in and for the city and county of San Francisco, State of California, to reverse the judgment rendered by the said superior court in the cause there pending and entitled "In the matter of the petition of Ah Sin for the writ of *habeas corpus*";

Now therefore if the above named Ah Sin shall prosecute said

writ of error to effect and answer all damages and costs if he fail
22 to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 9th day of April A. D. 1904.

(Signed) CHIN BOCK GUY. [SEAL.]
(Signed) CHIN KIM YOU. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Chin Bock Guy and Chin Kim You being severally duly sworn, each for himself deposes and says that he is a resident and householder within the city and county of San Francisco, State of California, and a resident of the said State. That he is one of the sureties mentioned in the foregoing undertaking; that he is worth the sum of two hundred dollars over and above all his just debts and liabilities exclusive of property exempt from execution.

(Signed) CHIN BOCK GUY.
(Signed) CHIN KIM YOU.

Subscribed and sworn to before me this 9th day of April A. D. 1904.

[SEAL.] (Signed) JULIUS CALMANN,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is hereby approved.

(Signed) WM. P. LAWLOR,
Judge of said Superior Court.
(Signed) FRANK H. KERRIGAN,
Presiding Judge of said Superior Court.

Endorsed: Filed April 9, 1904. John J. Greif, clerk, by Joseph Riordan, deputy clerk.

23 *Clerk's Certificate to Transcript.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

I, John J. Grief, clerk of the superior court in and for the city and county of San Francisco, State of California, do hereby certify that the foregoing twenty-two (22) pages, numbered from one to twenty-two, inclusive, are a true copy of the record, and of all proceedings in the cause mentioned in the annexed writ of error, and that the same constitute the return to said writ.

In witness whereof, I have set my hand and caused the seal of the superior court in and for the city and county of San Francisco, State of California, to be affixed this 30th day of April A. D. 1904.

[Seal Superior Court, City & County of San Francisco, Cal.]

JOHN J. GREIF,
Clerk of the Superior Court in and for the City and County of San Francisco, State of California,
By THOMAS L. DORAN,
Deputy Clerk.

I hereby stipulate that the foregoing transcript of record is correct, and constitutes the record upon the writ of error herein.

LEWIS F. BYINGTON,
District Attorney of the City and County of San Francisco, State of California, Attorney for Defendant in Error.

24 [Endorsed:] Supreme Court of the United States. Ah Sin, plaintiff in error *vs.* Geo. W. Wittman defendant in error. Transcript of record. George D. Collins, 21–22 Crocker bldg., San Francisco, Cal., attorney for plaintiff in error.

Endorsed on cover: File No. 19,327. California superior court, city & county of San Francisco. Term No. 245. Ah Sin, plaintiff in error, *vs.* George W. Wittman, as chief of police of the city and county of San Francisco, California. Filed May 7, 1904. File No. 19,327.

In the Supreme Court of the United States

OCTOBER TERM, 1904.

AH SIN,

Plaintiff in Error,

vs.

GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California,

Defendant in Error.

No. 245.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

The writ of error in this case is directed to the Superior Court in and for the City and County of San Francisco, State of California, upon a final judgment of that Court, rendered and entered therein in a cause entitled, "In the matter of the petition of Ah Sin for the writ of habeas corpus," being case number 15,198 in said Superior Court, and wherein was drawn in question the validity of a certain authority and a certain municipal ordinance of the City and County of San

Francisco, on the ground of repugnancy to the Constitution, treaty and laws of the United States, and the decision and judgment of the Superior Court were in favor of the State authority; and wherein also was drawn in question the construction of a clause of the Constitution of the United States and of a treaty of the United States with the Empire of China, and the decision and judgment of the said Superior Court were against the title, right, privilege and exemption specially set up and claimed in that behalf. The plaintiff in error was arrested by warrant and process issuing from the Police Court of the City and County of San Francisco, upon a complaint filed therein and charging him with violating Section 2 of a certain municipal ordinance of San Francisco (Rec., pp. 6, 7, 8), of which the following is a true copy:

"Bill No. 944.

"Ordinance No. 937.

"Prohibiting the exposure of gambling tables or implements in a room barred or barricaded in any manner to make it difficult of access or ingress to police officers, when three or more persons are present; or the visiting of a room barred and barricaded or protected in any manner to make it difficult of access or ingress to police, in which gambling tables or implements are exhibited or exposed when three or more persons are present.

" Be it ordained by the People of the City and Coun-
" ty of San Francisco as follows:

" Section 1. It shall be unlawful for any person
" within the limits of the City and County of San Fran-
" cisco to exhibit or expose to view in any barred or
" barricaded house or room, or in any place built or
" protected in a manner to make it difficult of access or
" ingress to police officers when three or more persons
" are present, any cards, dice, dominoes, fan-tan table
" or lay-out, or any part of such lay-out, or any gam-
" bling implements whatsoever.

" Section 2. It shall be unlawful for any person
" within the limits of the City and County of San Fran-
" cisco to visit or resort to any such barred or barri-
" caded house or room or other place built or protected
" in a manner to make it difficult of access or ingress
"to police officers, where any cards, dice, dominoes,
" fan-tan table or lay-out, or any part of such lay-out,
" or any gambling implements whatsoever are exhibit-
" ed or exposed to view when three or more persons
" are present.

" Section 3. Every person who shall violate any of
" the provisions of this ordinance shall be deemed
" guilty of misdemeanor, and upon conviction thereof
" shall be punished by a fine not to exceed five hun-
" dred dollars, or by imprisonment in the County Jail
" for not more than six months, or by both such fine
" and imprisonment.

"Section 4. This ordinance shall take effect and be "in force on and after its passage."

The record (p. 8) shows that "after a trial had by "the said Police Court upon the said complaint, and on "proof uncontradicted and unimpeached that the "premises therein described, to-wit: said house and "room, were barred and barricaded and protected only "against such police officers as had no right to enter "said premises, and who were mere trespassers," the plaintiff in error was adjudged guilty by said police court of being a visitor to said premises, and although, as the record shows (p. 8), "he visited the same inno- "cently and for a lawful purpose, and without any "knowledge that the same were barred or barricaded "or built or protected in a manner to make it difficult "of access or ingress to police officers, and without "any knowledge that there was exhibited or exposed "to view on said premises, any cards, dice, dominoes, "fan-tan table, or lay-out, or any gambling imple- "ments whatsoever."

The plaintiff in error was granted a writ of habeas corpus by the Superior Court, and the foregoing facts are pleaded in the petition. All the facts set forth in the petition for habeas corpus are by stipulation, conceded to be true, and it is so stated in the judgment of the Superior Court (Rec., p. 14). It is also alleged in the petition and admitted to be true, that the petitioner is a subject of the Emperor of China, and that the or-

dinance above referred to is "enforced and executed " by the said municipality of San Francisco, and said " State of California, solely and exclusively against " persons of the Chinese race and not otherwise." In the petition, the ordinance is attacked upon this ground, in that it operates to deny the Chinese the equal protection of the laws, thereby violating Section 1 of the Fourteenth Amendment; further, that the "ordinance " unjustly and arbitrarily discriminates in favor of " certain visitors and also in favor of certain persons " resorting to the house, room or place referred to in " said ordinance, as well as in favor of such persons " and visitors as resort to or visit such house or room " or place when not barred or barricaded or protected " in a manner to make the same difficult of access or " ingress to police officers, and is in that respect also " in violation of the Fourteenth Amendment of the " Constitution of the United States in thereby denying " to your petitioner the equal protection of the laws."

The petition for the writ of habeas corpus further avers, and the fact is admitted, that the plaintiff in error applied to the United States Circuit and District Courts for release on habeas corpus, and that his applications were denied "upon the sole and only ground " that your petitioner's remedy is by petition for the " writ of habeas corpus to the State court of compe- " tent jurisdiction, and in the event that relief is there " denied, by writ of error from the Supreme Court of

" the United States; and in support of said proposition " the following authorities are cited by said Circuit " Court, viz:

"*Ex parte Royall*, 117 U. S., 241.
"*Ex parte Fonda*, 117 U. S., 516.
"*In re Frederick*, 149 U. S., 70.
"*Pepke* vs. *Cronan*, 155 U. S., 100.
"*Bergeman* vs. *Backer*, 157 U. S., 655.
"*Whitten* vs. *Tomlinson*, 160 U. S., 231.
"*Baker* vs. *Grice*, 169 U. S., 284.
"*Markuson* vs. *Boucher*, 175 U. S., 184.

"And the following authorities are cited by the said " District Court, viz:

"*Pepke* vs. *Cronan*, 155 U. S., 100.
"*Markuson* vs. *Boucher*, 175 U. S., 184."

The foregoing matters are pleaded in the petition for habeas corpus and admitted to be true (Rec., p. 9).

It is also averred in the petition, and admitted, that the federal questions were raised in the Police Court and overruled by that tribunal; exception was duly reserved (Rec., p. 10). The petition for habeas corpus sets forth that by the provisions of said ordinance the petitioner "is " deprived of his liberty to visit or resort to the prem- " ises described in the said complaint, or to any place " or premises in the City and County of San Fran- " cisco that may be barred or barricaded or protected

" against police officers who have no right to enter
" such premises, merely because said premises are so
" barred or barricaded or protected, and there are ex-
" hibited or exposed in the presence of three or more
" persons *other than your petitioner*, the articles speci-
" fied in said ordinance, although your petitioner had
" nothing whatever to do with the barring or barri-
" cading or protecting of the premises or the exhibit-
" ing or exposing of any of the said articles, nor any
" knowledge when he visited the premises that they
" were barred or barricaded or protected against police
" officers, nor that any of said articles were exhibited
" upon the premises or in the presence of three or more
" persons. * * * That the said ordinance, to the ex-
" tent that the same makes punishable the mere act of
" visiting a house or room barred or barricaded, built
" or protected 'in a manner to make it difficult of ac-
" 'cess or ingress to police officers, where any part of
" 'such layout, or any gambling implements whatso-
" 'ever are exhibited or exposed to view when three or
" 'more persons are present,' is unconstitutional in
" that *it has no legitimate nor any relation to nor con-*
" *nection with the regulation or the prohibition or the*
" *suppression or the punishment of gambling*, and is
" not therefore within the authority of the State nor
" of the municipality of San Francisco in the lawful
" exercise of the police power; that it is an entirely
" arbitrary exertion of the powers of government and

" a violation of the Fourteenth Amendment of the Con-
" stitution of the United States, because not suscep-
" tible of being upheld as a lawful application of the
" police power of the State. Your petitioner avers that
" the State has no power to make criminal an innocent
" visit to a house or room where there is no gambling
" and where the visitor has nothing whatever to do
" with the ownership or possession or exhibition of
" any of the articles specified by the ordinance in ques-
" tion; that it is the constitutional right of your peti-
" tioner in the enjoyment of his liberty to visit any
" house or room where he can lawfully obtain admis-
" sion and where he goes for a lawful purpose, and
" while there commits no unlawful act; that even if it
" can be made criminal to bar or barricade or protect
" the house or room against all police officers, and ex-
" hibit therein in the presence of three or more persons
" any of the articles specified in the said ordinance,
" no such ordinance is a valid or constitutional exercise
" or exertion of the police power of the State if it
" makes criminal *the mere act of innocently visiting*
" *such a house or room where the visitor had no knowl-*
" *edge or notice of and nothing whatever to do with*
" *the barring or barricading of the premises, or the*
" *prohibited articles.*

" Your petitioner avers that the said ordinance is
" also void for the reason that it embraces more than
" one subject, in violation of Section 11 of Article II

" of the Charter of the City and County of San Fran-
" cisco, and the subject of the ordinance is not ex-
" pressed in its title.

" Your petitioner respectfully represents that any
" imprisonment under a void municipal ordinance is a
" deprivation of your petitioner's liberty, without due
" process of law, in violation of the Fourteenth
" Amendment of the Constitution of the United States,
" and properly justiciable upon the writ of habeas cor-
" pus.

" Your petitioner avers that by said ordinance he is
" deprived of his liberty, without due process of law,
" in that he is prohibited thereby from visiting, inno-
" cently and for a lawful purpose, the house or room
" or place mentioned in said ordinance.

" Your petitioner alleges that at all the times in this
" petition referred to, he was, ever since has been, and
" now is, a subject of the Emperor of China, and was
" at all said times, and ever since has been, and now is,
" within the jurisdiction of the State of California.

" That said ordinance is not only in conflict with Sec-
" tion 1 of the Fourteenth Amendment of the Consti-
" tution of the United States, but is also in contraven-
" tion of the treaty now existing between the United
" States and the Empire of China."

Upon the petition, the Superior Court ordered the writ of habeas corpus to issue; upon the return day of the writ, the matter was continued to a subsequent day,

when, on stipulation made by counsel, the facts were agreed upon as being the facts pleaded in the petition (Rec., pp. 13, 14). Thereupon, argument was had, and the Superior Court then rendered its judgment against the petitioner and ruled adversely to him upon each of the federal questions presented by the record; to all of which the petitioner reserved his exception (Rec., p. 14). Thereafter the writ of error was duly allowed, issued and served. The questions raised are presented on the petition to the Superior Court for the writ of habeas corpus; the stipulation that the facts are as in the petition set forth; the judgment; the assignment of errors and the writ of error.

ASSIGNMENT OF ERRORS.

The following constitute the errors relied upon in support of the prayer for a reversal of the judgment, viz:

I.

That the Superior Court committed manifest error in deciding that the plaintiff in error, the said Ah Sin, is not deprived of his liberty without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

II.

That the Superior Court committed manifest error in deciding that the plaintiff in error is not denied the

equal protection of the laws of the State of California, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

III.

That the Superior Court committed manifest error in deciding that the municipal ordinance set forth in the record, is not in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States, and does not deprive the plaintiff in error of his liberty without due process of law.

IV.

That the Superior Court committed manifest error in deciding that said municipal ordinance does not deprive the plaintiff in error of the equal protection of the laws.

V.

That the Superior Court committed manifest error in deciding that the plaintiff in error is not imprisoned in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

VI.

That the Superior Court committed manifest error in deciding that the said municipal ordinance is not void because unauthorized by the police power of the State.

VII.

That the Superior Court committed manifest error in deciding that the said municipal ordinance is not in contravention of the treaty existing between the United States and the Empire of China.

VIII.

That the Superior Court committed manifest error in deciding that plaintiff in error is not imprisoned in violation of the treaty now existing between the United States and the Empire of China.

IX.

That the judgment of the Superior Court operates to deprive the plaintiff in error of his liberty without due process of law, in violation of the Constitution of the United States, to-wit: Section 1 of the Fourteenth Amendment.

X.

That the judgment of the Superior Court operates to deny the plaintiff in error, the equal protection of the laws, in violation of the Constitution of the United States, to-wit: Section 1 of the Fourteenth Amendment.

ARGUMENT.

1. The record shows conclusively that the ordinance in question is enforced and executed against Chinese

persons only. It is therefore in violation of the Fourteenth Amendment and void.

Yick Wo vs. *Hopkins*, 118 U. S., 356.

Say the Court:

"The cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justce is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in *Henderson* vs. *Mayor of New York*, 92 U. S., 259; *Chy Lung* vs. *Freeman*, 92

"U. S., 275; *Ex parte Virginia*, 100 U. S., 339; *Neal* "vs. *Delaware*, 103 U. S., 370; and *Soon Hing* vs. "*Crowley*, 113 U. S., 703. * * * The fact of this "discrimination is admitted. No reason for it is "shown, and the conclusion cannot be resisted, that no "reason for it exists except hostility to the race and "nationality to which the petitioners belong, and "which in the eye of the law is not justified. The dis-"crimination is, therefore, illegal, and the public ad-"ministration which enforces it is a denial of the equal "protection of the laws and a violation of the Four-"teenth Amendment of the Constitution."

Yick Wo vs. *Hopkins*, 118 U. S., 373.

The ordinance is for the same reasons in violation of the "most favored nation" clause of the Treaty with the Empire of China. There can be no question as to the fact of discrimination. At page 9 of the printed Record it is stated as one of the averments of the petition for habeas corpus: "Your petitioner further avers "that said ordinance and the provisions thereof are "enforced and executed by the said municipality of "San Francisco, and said State of California, solely "and exclusively against persons of the Chinese race "and not otherwise."

This averment, by stipulation of counsel for the defendant in error, and by the judgment of the Superior Court (Rec., p. 14), is a correct statement of the fact.

As there is nothing to controvert the averment of the petition in that respect, it would be deemed a correct statement of the fact, even if there were no stipulation to that effect.

Whitten vs. *Tomlinson*, 160 U. S., 231.
Kohl vs. *Lehlback*, 160 U. S., 296.
Ex parte Smith, 143 Cal., 368, 370.

The stipulation, however, is a direct admission of the fact of discrimination.

2. It is manifest from the facts averred in the petition, and admitted by the defendant in error, that the State Court has so construed the ordinance that it makes criminal the innocent visit to a house, room or place, rightly and lawfully barricaded and barred against trespassing, by the police, and where, without the consent, connivance, or privity of the visitor, there is exposed to view the articles specified in the ordinance, there being present three or more persons. It is inseparable from the constitutional right of liberty that a person may visit any place where he is lawfully invited; and this right cannot be infringed, except where necessary in the legitimate exercise of the police power of the State. It certainly is not within the scope of the police power of the State to prohibit or punish what is entirely innocent or indifferent.

Lawton vs. *Steele*, 152 U. S., 137.
Mugler vs. *Kansas*, 123 U. S., 661.

Health Dept. vs. *Trinity Church*, 145 N. Y., 321.
In re Jacobs, 98 N. Y., 105.

"If, therefore, a statute purporting to have been "enacted to protect the public health, the public morals, "or the public safety, has no real or substantial rela- "tion to those objects, or is a palpable invasion of the "rights secured by the fundamental law, it is the duty "of the Courts to so adjudge, and thereby give effect "to the Constitution."

Mugler vs. *Kansas*, 123 U. S., 661.
Minnesota vs. Barber, 136 U. S., 320.

"Such laws must tend toward the preservation of the "lives, health, morals, or welfare of the community, "and the Court must be enabled to see some clear and "real connection between the assumed purpose of the "law and the actual provisions thereof, and that the "latter tend in some plain and appreciable manner "towards the accomplishment of the objects for which "the Legislature may use this power."

In re Jacobs, 98 N. Y., 105.

"Our Constitution and laws guarantee to every citi- "zen the right to go where and when he pleases, exact- "ing from him only that he conduct himself in a decent "and orderly manner, that he disturb no one, and that "he interfere with the rights of no other citizen."

St. Louis vs. *Roche*, 31 S. W. Rep., 915.

Speaking of the exercise of the police power, the Court has said:

"To justify the State in thus interposing its author-
"ity in behalf of the public, it must appear, first, that
"the interests of the public generally, as distinguished
"from those of a particular class, require such inter-
"ference; and, second, that the means are reasonably
"necessary for the accomplishment of the purpose, and
"not unduly oppressive upon individuals. The Legis-
"lature may not, under the guise of protecting the
"public interests, arbitrarily interfere with private
"business, or impose unusual and unnecessary restric-
"tions upon lawful occupations. In other words, its
"determination as to what is a proper exercise of its
"police powers is not final or conclusive, but is subject
"to the supervision of the Courts."

Lawton vs. *Steele*, 152 U. S., 137.

Speaking of the police power, the Court say:

"This power must, however, be exercised in subordi-
"nation to the provisions of the Federal Constitution.
"If, in the assumed exercise of its police power, the
"Legislature of a State directly and plainly violates a
"provision of the Constitution of the United States,
"such legislation would be void."

Lake Shore, etc., Ry. Co. vs. *Smith*, 173 U. S., 689.

We also invite attention to the opinion of the Court in *Gulf, etc., Ry.* vs. *Ellis,* 165 U. S., 155, 159, 165.

The record shows that the plaintiff in error visited, innocently and for a lawful purpose, the house and room referred to in the complaint, and without any knowledge that the place was barred or barricaded, or built or protected in a manner to make it difficult of "access or ingress" to police officers, and without any knowledge that there were exhibited or exposed to view, on said premises, any cards, dice, dominoes, fantan table, or lay-out, or any gambling implements whatever (Rec., p. 8), yet the State Court held that the ordinance made the visit criminal, and punishable as therein provided. And in that connection, it should be borne in mind that the State Court placed upon the ordinance the construction mentioned, although it further appeared that the place visited by plaintiff in error was barred and barricaded and protected only against such police officers as had *no right* to enter said premises, and who were mere trespassers (Rec., p. 8).

It is certainly the constitutional right of a person to bar, barricade and protect his premises against entry by police officers who have no right to enter and who are nothing else but trespassers. The principle of the common law is very eloquently expressed by Lord Chatham in the following terms:

"The poorest man may, in his cottage, bid defiance "to all the forces of the Crown. It may be frail; its

"roof may shake; the wind may blow through it; the "storm may enter; the rain may enter; but the King of "England may not enter; all his force dares not cross "the threshold of the ruined tenement."

Nor can a search be made by a police officer unless he have a valid warrant authorizing the act; he cannot enter to make an arrest, unless he have a warrant or unless he is pursuing an escaping criminal, or unless an offense is committed in his presence; but, as Bishop says:

"Ordinarily, what is done in a barred and bolted "house is not in the presence of a man outside. * * "Not even an officer can, without a warrant, break an "outer door to arrest persons within, who are merely "engaged in unlawful gaming."

1 Bish. New Crim. Proc., Sec. 197.
McLennan vs. *Richardson*, 15 Gray, 74.

Of course, a police officer may enter to arrest for a felony, but the record shows affirmatively that the premises visited by the plaintiff in error were barred against police officers who had no right to enter and who, if they had entered, would have been *trespassers.* Clearly, an ordinance that would make criminal, or an element in the definition of a crime, the act of barring or barricading premises against intrusion by trespassers, would be unconstitutional, as being an arbitrary invasion of fundamental rights, and, in effect, an enact-

ment depriving a person of a property right without due process of law.

According to the record, the result of the ordinance in question is to deprive the plaintiff in error of his liberty to visit or resort to the premises described in the complaint, or to any place or premises in the City and County of San Francisco, that may be *lawfully* barred or barricaded or protected against police officers who have no right to enter such premises, merely because the premises are barred or barricaded or protected, and there are exhibited or exposed, in the presence of three or more persons other than the plaintiff in error, the articles specified in the ordinance, although he had nothing whatever to do with the barring or barricading or protecting of the premises, or the exhibiting or exposing of any of the designated articles, nor any knowledge, when he visited the premises, that they were barred or barricaded or protected against police officers, nor that any of the prohibited articles were exhibited upon the premises, nor exhibited in the presence of three or more persons.

We insist that the ordinance, to the extent it makes criminal and punishable the mere act of innocently visiting, is unconstitutional in that it has no legitimate nor any relation to, nor connection with, the regulation, or the prohibition, or the suppression, or the punishment, of gambling, and is not, therefore, within the authority of the State nor of the municipality of San Francisco,

in the lawful exercise of the police power; that it is an entirely arbitrary exertion of the powers of government, and a violation of the Fourteenth Amendment.

The State has no power to make criminal an innocent visit to a house or room where there is no gambling and where the visitor has nothing whatever to do with the ownership or possession or exhibition of any of the articles specified by the ordinance in question. It is the constitutional right of all persons to visit any house or room where they may lawfully obtain permission to enter and where they go for a lawful purpose, and while there commit no unlawful act; and even if it can be made criminal to bar or barricade or protect the house or room against all police officers, and exhibit therein, in the presence of three or more persons, any of the articles specified in the ordinance, no ordinance is a valid or constitutional exercise or exertion of the police power of the State, if it makes criminal (and the State Court has decided it does) the mere act of innocently visiting such a house or room, where the visitor had no knowledge or notice of, and nothing whatever to do with, the barring or barricading of the premises, and nothing to do with the possession, ownership, or exhibition of the prohibited articles.

The plaintiff in error is not charged with gambling, nor with visiting a gambling-place, nor with owning or possessing, or using or exhibiting, or permitting the exhibition, of gambling implements.

We further insist that the ordinance is unconstitutional because of its discrimination in favor of the three persons who visit the designated house or room; their visit is not unlawful, but the visit of the plaintiff in error, while the other three are present, is made criminal and punishable. The plaintiff in error is thus deprived of the equal protection of the laws.

Then, again, the discrimination of the ordinance is, for the same reason, unconstitutional in permitting any number of persons to visit a house or room where the prohibited articles are exhibited, if the place is not barred or barricaded or protected in a manner to make it difficult "of access or ingress to police officers."

An ordinance similar to the one we are attacking was held valid by the Supreme Court of California in the *Matter of Ah Cheung*, 136 Cal., 678; but the points we urge were evidently neither raised or decided; and even if they had been raised and decided, it would not affect our right to have the questions passed upon by the Supreme Court of the United States. It is true, the Supreme Court of California, in the case referred to, construes the ordinance as applicable "only to "places which are specially barred and barricaded "against intrusion by officers of the law, so that illegal "gambling may be protected from discovery"; but, obviously, this does not involve any of the points we have raised in this brief, or on the record, as against the validity of this ordinance. Even giving to the ordi-

nance the construction which the Supreme Court of California says it should have, still the points we make against the constitutionality of the ordinance, and the reasoning we present in their support, continue pertinent, nevertheless; and are not in any respect met by the interpretation which the highest Court of the State has given a similar ordinance in the *Matter of Ah Cheung*, 136 Cal., 678.

No one will contend that, under the guise of the police power, the State can destroy fundamental rights. We have no doubt that the State may, by means of appropriate legislation, prohibit the barring or barricading of premises against police officers *who have the right to enter;* but surely the State cannot, under the guise of the police power, prohibit the barring or barricading of premises against policemen who have no right to enter, and who, if they did enter, would be nothing else but trespassers. We simply suggest this in response to what is said by the Supreme Court of California in the above quoted portion of its opinion. In the same connection we desire to say that the fallacy of the Court's view lies in the assumption that police officers have the legal right to enter upon private premises to ascertain whether illegal gambling is being carried on; certainly no such right exists, and its attempted exercise would be a flagrant trespass. A police officer, as such, has no right to enter on private premises unless in the execution of process, or to make an arrest for felony, or to

prevent an escape; manifestly not to discover, or suppress, or make an arrest for gambling where he has no warrant or process.

1 *Bish. New Crim. Proc.*, sec. 197.
McLennan vs. *Richardson*, 15 Gray 74.

To the same effect is Section 836 of the Penal Code of the State of California, which reads as follows:

"A peace officer may make an arrest in obedience to a "warrant delivered to him, or may, without a warrant, "arrest a person—1. For a public offense committed "or attempted in his presence; 2. When a person ar- "rested has committed a felony, although not in his "presence; 3. When a felony has in fact been commit- "ted, and he has reasonable cause for believing the per- "son arrested to have committed it; 4. On a charge "made, upon reasonable cause, of the commission of a "felony by the party arrested; 5. At night, when there "is reasonable cause to believe that he has committed a "felony."

These provisions measure the right of a ~~public~~ police officer to enter upon private premises.

It is, we think, in that respect especially, the Supreme Court of California has ignored the law by *assuming* that a police officer as such, may rightfully enter on private premises to *discover* whether illegal gambling is being carried on; but the ordinance says nothing about gambling, and merely requires the exposing to view of articles that may be used in gambling; so what-

ever the argument, the assumption indulged in by the Supreme Court of the State, is entirely untenable and inadmissible. The system of police espionage prevailing in Europe would not be lawful in the United States, nor in England. Even it would be unlawful to issue a search-warrant for the purpose of obtaining evidence of crime, by way of discovery.

Cooley's Const. Lim., p. 431 (7th Ed.).

And the same distinguished writer states the law in very clear terms, against the claim of the police to make entry on private premises for the purpose of *discovering* crime.

Cooley's Const. Lim., p. 424 (7th Ed.).

Boyd vs United States, 116 U.S. 630

And whatever may be the opinion of the Supreme Court of California, the Supreme Court of the United States will place its own construction upon the ordinance, and will not interpolate into it, in order to make it valid, a provision it does not contain. The province of the Court is not to make but to interpret laws. The fact that the State Supreme Court has construed the ordinance and read into it certain provisions does not prevent the Federal Courts from putting their own construction on the ordinance. Say the Supreme Court of the United States in passing upon the point: "That, "however, does not preclude this Court from putting "upon the ordinances of the Supervisors of the County

"and City of San Francisco an independent construct-
"ion; for the determination of the question whether
"the proceedings under these ordinances and in en-
"forcement of them are in conflict with the Constitu-
"tion and laws of the United States, necessarily in-
"volves the meaning of the ordinances, which, for that
"purpose, we are required to ascertain and adjudge.
"We are consequently constrained, at the outset, to
"differ from the Supreme Court of California upon the
"real meaning of the ordinances in question."

Yick Wo vs. *Hopkins*, 118 U. S. 366.

As the ordinance makes no distinction between an innocent visitor and a guilty one; and in effect prohibits the barring of private premises against police officers who have no right to enter; and is arbitrary in its discriminations, it is void.

We simply wish to say in conclusion that in California, there is no appeal allowed from a judgment in a habeas corpus case; and that therefore the Superior Court is in this instance, the highest Court of the State in which a decision could be had; for that reason the writ of error properly went out to the Superior Court.

Downham vs. *Alexandria*, 9 Wall., 659.
Kurtz vs. *Moffitt*, 115 U. S., 487, 489.

We respectfully submit that the ordinance in question is in conflict with the Fourteenth Amendment, and also in violation of the treaty with China. The ordinance

should, therefore, be adjudged void, and the judgment of the Superior Court should be *reversed*, with directions to discharge the plaintiff in error.

GEORGE D. COLLINS,
Attorney for the Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 245.

AH SIN,

Plaintiff in Error,

vs.

GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California,

Defendant in Error.

In Error to the Superior Court, in and for the City and County of San Francisco, State of California.

Reply Brief of Plaintiff in Error.

I.

It is a matter entirely indefensible and inexcusable as well as censurable, for the counsel who represent the defendant in error, to assail the integrity of the record by their mere *ipsa dixit*, especially in view of the undisputed and unquestioned stipulation they have entered into (Record, p. 16) in the following terms, viz:

> "I hereby stipulate that the foregoing transcript of record is correct, and constitutes the record upon the writ of error herein.
>
> (Signed.) LEWIS F. BYINGTON,
> *District Attorney of the City and County of San Francisco, State of California, Attorney for Defendant in Error.*"

This stipulation not only conclusively refutes the contention that the allegations of the petition for *habeas corpus* were not admitted to be true, but it also fully answers the objection that the "return" to the writ has not been transmitted with the rest of the record. It seems that the attack now made upon the record is the invention of one I. Harris, who wrote the brief for defendant in error, and who is an assistant in the office of Byington, the district attorney. Mr. Harris was not present at the hearing of the *habeas corpus* case in the Superior Court and it is certainly very presumptuous in him to set up his contradiction of the record and expect, as he evidently does, that it be received in preference to the record itself.

In additional support of the record we have the judgment of the Superior Court, authenticated by the signature of the judge who presided at the hearing (Record, p. 14). "This matter," so states the record,

> "came on regularly for hearing this 28th day of March, A. D. 1904, the petitioner being represented by his counsel and the people being represented by the district attorney; whereupon it was stipulated and agreed in open court by counsel for the people and by counsel for the petitioner that the facts are, as set forth in the petition on file herein for the writ of *habeas corpus*. The cause was then argued by counsel on the points stated in the said petition and was thereupon submitted to the court for its decision and judgment; and the court being fully advised in the matter does now, upon the authority of the matter of *Ah Cheung*, 136 Cal., 678, dismiss the writ of *habaes corpus* heretofore issued herein and remand the petitioner to the custody of the chief of police of the City and County of San Francisco. Ordered accordingly. The petitioner reserved an exception to the judgment.

"Done in open court this 28th day of March, A. D. 1904.

(Signed) "WILLIAM P. LAWLOR,
Judge of said Superior Court."

In the very teeth of this judgment and of the stipulations set forth at page 16 of the printed record, and with a recklessness of assertion that defies responsibility, the counsel for the defendant in error now seek to impeach the verity of the record by falsely stating that it does not speak the truth; surely they must know that a judicial record cannot be impeached by contradiction *arguendo;* and if their conduct is attacked as being grossly improper and unprofessional, they cannot quarrel with the justice of the arraignment even though they may intensely feel the sting of its severity. We insist it is no trivial matter to charge falsity in a judicial record and suggest chicanary and fraud in its production; and when, as in this case, the charge is entirely groundless, the enormity of the offense committed against professional propriety is quite manifest. The case was presented to the Superior Court upon all the matters alleged in the petition for the writ of *habeas corpus* and the record so states (p. 14.) And when the district attorney cited the ruling in *Ah Cheung,* 136 Cal., 678, it was replied by us that the case was not authority on some of the questions we presented and that as to the points there actually decided, we assailed the decision as being in conflict with the Fourteenth Amendment. We did not at any time suggest that our only object was to test the soundness of the State Supreme Court decision. If such was our purpose, the petition for the writ of *habeas corpus* would not have specifically extended to other matters of federal cognizance, and also to matters exclusively of state cognizance, such as the proposition that the ordinance is void because it em-

braces more than one subject, and is therefore in violation of the municipal charter of San Francisco. There were no such questions raised or decided in the *Ah Cheung* case; we certainly did not at any time confine ourselves to the decision or to the record in that case; and we never stated to the Superior Court that we were merely seeking a review of the *Ah Cheung* decision. The record on this writ of error is conclusively to the contrary. So, too, the assertion of counsel for the defendant in error that none of the federal questions were "ever suggested to either the court or the district attorney until the filing of the brief by plaintiff in error herein, is palpably false. The petition for *habeas corpus* fully sets forth each and all of the federal questions, and the judgment of the Superior Court appearing at pages 13 and 14 of the printed record expressly states they were all of them presented; and they certainly were. The Superior Court seemed to think that the decision in the *Ah Cheung* case was authority not only on the points there presented and decided but also upon every point raised in our petition, and refused us relief.

As the questions presented in our petition for *habeas corpus* are, in the main, federal questions and as the record shows affirmatively, they were all raised in the lower court at the hearing of the case, the decision refusing relief to the plaintiff in error is a decision on these very questions, since if any one of these questions had been decided in *his* favor he would have been entitled to and would have obtained his discharge on the writ of *habeas corpus* that had been issued in the case. And turning to the writ of error as allowed by the trial judge and the presiding judge of the Superior Court (Record, p. 1), it expressly states that the federal questions were both raised and decided. An examination of the record will

clearly make manifest the fact that no decision was possible without necessarily passing upon each and all of the federal questions raised by the plaintiff in error. The exceedingly improper attack made by counsel for the defendant in error upon the verity of the record is the more extraordinary because they must have known that the record cannot be thus impeached.

"The record imports absolute verity."

Evans v. *Stettnisch*, 149 U. S., 605, 607.

"No evidence *dehors* the record, as certified and returned by the clerk of the Circuit Court, can be received here to impeach its verity, or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court."

Hudgins v. *Kemp*, 18 How., 534.

"The record as embodied in a properly prepared and duly authenticated transcript imports absolute verity and cannot be aided, varied or contradicted by extrinsic evidence. The record cannot be contradicted by a plea in the appellate tribunal."

Elliott's Appellate Proc., Sec. 186.

Middlebrooks v. *Middlebrooks*, 57 Ga., 193.

Bartoli v. *Hugneward*, 39 La. Ann., 411.

Boston v. *Haynes*, 31 Cal., 107.

Ashley v. *Howard*, 90 Ga., 132.

Nixon v. *Barber*, 27 Vt., 783.

Wilmot v. *Smith*, 86 Wis., 299.

Wilson v. *Taylor*, 119 Mo., 626.

Blanchard v. *Devoe*, 80 Ia., 521.

Succession of Edwards, 34 La. Ann., 211.

Baird v. *Woodard*, 43 Neb., 310.

These cases are cited in the Century Digest in support of the point we are urging.

We insist there is no possible excuse for the attack made upon the record, not only because it is made in a manner unauthorized by law, but for the further reason that by both the judgment of the Superior Court and the stipulation of the counsel for the defendant in error, appearing at page 16 of the printed record, the attempted impeachment of the record is founded upon assertions absolutely false and untrue.

If for any reason a record does not speak the truth, the remedy must be sought in the court whose record it is. It is not within the province of an appellate tribunal to entertain or act upon a suggestion that the record does not express the truth. If the transcript of the record is defective or incorrect or incomplete, in that event only can the Appellate Court grant relief; this is done by means of a *certiorari* or mandamus.

Nashua & L. R. R. v. *Boston & L. R. R.*, 21 U. S. App., 50, 60, 63.

II.

The objection that the return to the writ of *habeas corpus* has been omitted from the transcript of the record, is clearly without merit. No paper or document is properly made a part of the transcript of the record unless it is pertinent to the questions raised. The practice of bringing up unnecessary papers has been repeatedly condemned.

Nashua & L. R. R. v. *Boston & L. R. R.*, 21 U. S. App., 60, citing:

Railway Co. v. *Stewart*, 95 U. S., 279, 284.

Craig v. *Smith*, 100 U. S., 226, 230.

The Adriatic, 103 U. S., 730.

Ball & S. Co. v. *Kraetzer*, 150 U. S., 111, 118.

> "Where the transcript or return contains all that is necessary to the decision of the matters assigned as error, a motion to dismiss or affirm on the ground of defects or omissions therein of an immaterial character will not be sustained."
>
> 3 Cyc., 139.

Besides, it is expressly stipulated by the counsel for the defendant in error (p. 16) that the transcript of the record "is correct and constitutes the record upon the writ of error herein." Why the counsel should seek to impugn his own stipulation is certainly beyond our comprehension. Manifestly the return to the writ of *habeas corpus* is entirely irrelevant to the questions raised. The petition for the writ sets forth all the essential facts and its allegations are admitted to be true and so stated in the judgment of the Superior Court (pp. 13, 14). Even if no such stipulation had been made, the result would be the same, as the return does not controvert the averments of the petition. Say the Supreme Court of California, speaking of the petition and return on *habeas corpus*:

> "Under our practice, upon the filing of the return, the petition is treated as a traverse to it. Then if any of the matters in the petition so treated as a traverse to the return are denied, it is incumbent upon the person to whom the writ is addressed to join issue upon them. In the absence of such issue joined, the facts set forth in the petition will be taken as true. So in this case the facts averred will be considered as admitted."
>
> *In Re Smith*, 143 Cal., 370.

This case was quite recently cited by the Supreme Court of the United States in support of the point we are now making, in a *habeas corpus* proceeding that went up on writ of error to the Supreme Court of California. We have been unable to obtain a reference to the report

of the case but we know it involved some corporation or company in Los Angeles.

In our opening brief we have cited decisions of the Supreme Court of the United States fully sustaining the proposition that the averments of the petition for *habeas corpus* must be taken as true if not controverted by the return or by an answer in aid of the return. There was no issue joined or tendered on the petition for *habeas corpus* and therefore its averments must be taken as stating the truth even though no stipulation had been made to the effect that the matters stated in the petition are the facts of the case.

III.

Nor is there any merit in the contention of counsel for the defendant in error to the effect that the Supreme Court had no jurisdiction in the *habeas corpus* proceedings because it admitted the prisoner to bail pending the hearing upon the writ. In the first place the point itself cannot be considered upon the writ of error, as the decision of the Superior Court is based exclusively upon the federal questions involved and not at all upon the point now for the first time suggested by counsel for the defendant in error. In the next place it is well settled that a court having power to issue the writ of *habeas corpus* may admit the prisoner to bail pending the determination of the case.

Barth v. *Clise*, 12 Wall., 401, 402.
In Re Kaine, 14 How., 133.
King v. *Bethel*, 5 Mod., 22.

It has always been the practice in California to admit to bail pending the decision upon the writ of *habeas cor-*

pus and counsel for defendant in error made no attempt to question the practice when the case was before the Superior Court. No one disputes the proposition that the person in whose interest the writ is issued must be in actual custody when the petition is filed and the writ served. The petition in this case expressly avers that Ah Sin is in custody; the pleading is verified and in addition, the record contains the admission that the petition states the truth. The Superior Court ordered the prisoner admitted to bail pending the hearing and determination of the writ (p. 12) and the writ of *habeas corpus* so states (p. 13). On this writ of error, by the provisions of the rule of the Supreme Court of the United States, the plaintiff in error is entitled to bail.

But the point attempted to be raised by the defendant in error cannot be considered. In the first place the record does not show that the plaintiff in error was not in custody when the writ of *habeas corpus* was served, and

> *"De non apparentibus et de non existentibus eadem est ratio,* is an old and well established maxim in legal proceedings and is founded on principles of justice as well as of law."
>
> *United States* v. *Wilkinson,* 12 How., 253, per TANEY, C. J.

In the next place no such point was raised or determined in the Superior Court; and the judgment of the Superior Court excluded the point entirely by placing the decision upon the merits of the case as presented in the petition for the writ of *habeas corpus* where it is expressly alleged that Ah Sin is in the custody of the chief of police, who is the defendant in error. The fact that Ah Sin has been released on bail pending the proceedings in error does not impair or supersede or destroy the jurisdiction of the Superior Court, nor the jurisdiction of the

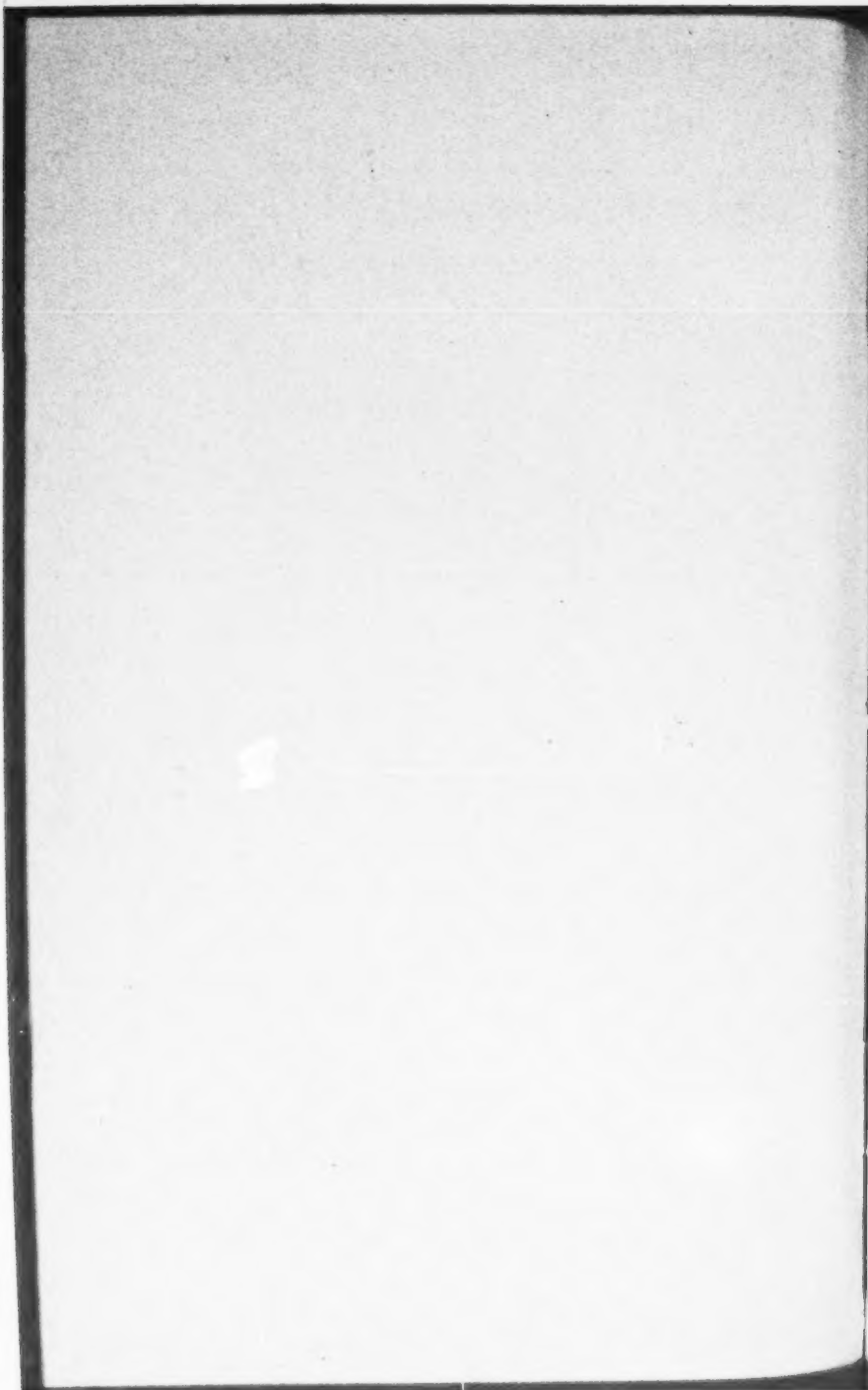
Supreme Court of the United States. Nor can the latter court do otherwise than take the record as being conclusive of the facts and of the grounds upon which the Superior Court rendered its decision.

IV.

In construing and interpreting the ordinance in question, the Supreme Court of the United States will be guided by its own view of the ordinance and will determine its meaning accordingly and will not receive as authoritative the construction given by the state court. This was so held in *Yick Wo* v. *Hopkins,* 118 U. S., cited in our opening brief. Therefore it is of no importance to know what construction the state court has placed upon the ordinance by way of judicial legislation in order to sustain it. The record shows the interpretation placed on the ordinance by the police court, the court of original jurisdiction, and affirmed by the Superior Court and shows that the effect of the ordinance is to make guilty of crime a person entirely innocent. An ordinance having such an effect is clearly unconstitutional and void for that reason alone. As to the other points presented in the petition for *habeas corpus,* they were all of them raised, argued and decided in the Superior Court, as the record affirmatively shows, and nothing in the naked and entirely unsupported statement of the counsel for defendant in error can impeach the verity of the record. It does not require our counter-assertion to sustain the record; but the fact is the petition for the writ of *habeas corpus* was before the Superior Court and read to the court on the hearing and each and every point there averred was presented and argued as is stated in the

judgment appearing at pages 13 and 14 of the printed record. The terms of that judgment are a complete and conclusive refutation of the position taken by the counsel for defendant in error. Our opening brief fully presents the points and authorities upon which we confidently rely for a reversal of the judgment of the Superior Court; we have in addition covered in this reply brief, every proposition urged by the defendant in error, and we respectfully submit that upon the points and authorities presented in our opening brief, the judgment of the Superior Court should of right and according to the law of the land, be *reversed*.

GEORGE D. COLLINS,
Attorney for Plaintiff in Error.



In the Supreme Court of the United States

OCTOBER TERM, 1904.

AH SIN,

Plaintiff in Error,

vs.

GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California,

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT.

The printed record of this case now before the Court is both defective and untrue. It is defective in that it omits to contain the most important document on file in the Habeas Corpus proceedings, from the judgment in which this Writ of Error is prosecuted. That document is the Return of the Defendant in Error to the Writ of Habeas Corpus issued to him by the Superior Court. The Return is the most important document in the proceedings, because under the California law it is the pleading around which the whole proceeding re-

volves, and upon the validity and truth of which the legality or illegality of the detention of the prisoner depends. The Return is in the following language, namely:

"In the Superior Court of the City and County of San Francisco, State of California.

"Ex Parte Ah Sin (on Habeas Corpus)—No. 15,198.

"State of California,

"City and County of San Francisco—ss.

"I, George W. Wittman, Chief of Police of said City "and County of San Francisco, acting in obedience to "the Writ of Habeas Corpus issued herein, by said "Honorable Court, do here and now respectfully re- "turn and show that I am unable to produce the body "of the Ah Sin; he, the Ah Sin, having been released "on bail, a true copy of the order of discharge on bail "is hereto attached.

"I would further return and show that on the 25th "day of January, A. D. 1904, the said Ah Sin was ar- "rested in the actual commission of the offense of vio- "lating the provisions of Sections 2 and 3 of Order 937 "of the Board of Supervisors of the City and County "of San Francisco, State of California, true copy of "the complaint in said cause is hereto attached and "made a part of this, my return to said Writ of Habeas "Corpus.

"GEO. W. WITTMAN,

"Chief of Police.

"Dated, San Francisco, Cala., March 22, 1904."

It further appears from other documents annexed to the Return that on the day preceding its filing, the prisoner was released on bail, and that therefore, when the Return was made and the Hearing had by the Court, the prisoner was not in actual custody and was not being restrained of his liberty. This entire Return has been omitted from the record filed by plaintiff in error.

Besides this defect, the record as filed presents a false and untrue statement of the case. There was no stipulation entered into by the District Attorney agreeing that the facts were true as stated in the petition for Writ of Habeas Corpus filed by the Plaintiff in Error. Counsel tries to make this appear from a finding inserted in the judgment of the Court. No such stipulation was entered into, and the facts stated in the petition for Writ of Habeas Corpus were not admitted to be true, and are not true. It is not true, and it was not so stipulated, that the Plaintiff in Error was adjudged guilty by the Police Magistrate of being a visitor to the premises described in the record, "although he visited the same innocently and for a lawful purpose, etc." (Record, p. 8). It is not true, and it was not so stipulated, that the ordinance here in question "is enforced "solely and exclusively against persons of the Chinese "race, and not otherwise" (Record, p. 9). It is not true, and it was not so stipulated, that the Federal questions which are now sought to be presented to this Court were submitted and argued before the Police Magistrate who convicted plaintiff in error (Record,

p. 9). It is not true, and counsel did not so stipulate, that the cause was argued before the Superior Court on the points stated in the petition, and was thereupon submitted to the said Court for decision.

The facts in this case, so far as the proceedings are concerned, occurred as follows: The plaintiff in error was arrested upon a charge of violating the provisions of the ordinance now before this Court. After plea and trial he was adjudged guilty by the Police Magistrate. He then sued out a writ of habeas corpus before the Superior Court. It was thereupon stipulated that these facts were true, and counsel for plaintiff in error expressly stated to the Court that his only object in these proceedings was to have tested the soundness of the decision of the State Supreme Court in the matter of Ah Cheung, and that a formal ruling be made by the Superior Court upon which subsequent proceedings might be taken. (In the Matter of Ah Cheung, 136 Cal., 678, the Supreme Court of the State sustained as constitutional an ordinance similar in all respects to the one here involved.) No other question was presented to the Court, and none of the Federal questions now sought for the first time to be interjected into these proceedings were ever suggested to either the Court or the District Attorney until the filing of the brief by Plaintiff in Error herein.

ARGUMENT.

1. The Return to the Writ of Habeas Corpus, which is omitted from the printed record, but which is quoted at length above, should be taken by this Court as the statement of facts upon which the Superir Court relied in discharging the writ. As was said above, the Return is the essential pleading in the proceedings, and upon the facts stated therein depends the legality or illegality of the detention of the prisoner.

"The party brought before the Court or Judge, on "the return of the writ, may deny or controvert any "of the material facts or matters set forth in the re- "turn, or except to the sufficiency thereof, or allege any "fact to show either that his imprisonment is unlawful "or that he is entitled to his discharge."

Cal. Penal Code, Sec. 1484.

The record does not show that the plaintiff in error either answered the Return or excepted to its legal sufficiency. He is therefore bound b ythe statement of facts contained in it, and those facts are amply sufficient to sustain the judgment of the Superior Court in discharging the Writ. For besides showing the legality of the original arrest, the Return furthermore shows that at the time of its filing and at the time of the Hearing by the Court, the Plaintiff in Error was not in custody and was not restrained of his liberty in any way.

The law of the State of California, similar to that of

other jurisdictions, contemplates an actual restraint or detention as the basis for the remedy of Habeas Corpus.

Cal. Penal Code, Sec. 1473.

"If when the jurisdiction of the Court is invoked the "applicant is not restrained of his liberty by any one, "there is no case for the cognizance of this Court."

Ex Parte Henion, 55 Pac. Rep. (Cal.), 326.

"There must be actual confinement or the present "means of enforcing it to make a case for habeas cor- " pus, and the person who has given bail for his ap- "pearance and has been released from custody is not "entitled to the writ."

Wales vs. *Whitney*, 114 U. S., pp. 571-575.

"The writ of habeas corpus cannot apply or attach "or be resorted to except when the party to be affected "by it is in illegal restraint."

Ex Parte Talbutt, 44 S. W. Rep. (Texas), 832.
Ex Parte Branch, 36 Tex. Crim., 384.

Courts have also refused to take jurisdiction on appeal in Habeas Corpus proceedings where the applicant was originally in confinement, but where, prior to and pending the appeal he had given bail for his appearance and had been released.

Ex Parte Talbutt, 44 S. W. Rep. (Texas), 832.
Ex Parte Walker, 53 Miss., 366.

The fact that the Plaintiff in Error was not in custody at the time of filing of the Return, at the Hearing thereof by the Court, and that he has never been restrained of his liberty or in confinement at any time since the filing of the petition for the writ, reduces this entire controversy to a moot case, and it is conceivable that counsel perceiving this consequence, omitted the Return from the record.

2. The only matter which was presented for decision by the Superior Court, as shown in the above statement of facts, was, whether or not the decision of the State Supreme Court in the matter of Ah Cheung should be sustained; and if we understand the argument of counsel, it is contended that that decision is erroneous, because under it an innocent or lawful visit to a house such as is described in the ordinance is made criminal. This conclusion is deduced from the fact that the ordinance does not contain any provision with regard to the intent with which the "visit" is made. (Brief of Plaintiff in Error, p. 15.)

Ordinances, similar in this respect to the one here involved, have been construed by the State Supreme Court, and held to be constitutional in the face of attack based upon identically the same ground. In all such cases it has been held that, notwithstanding the generality of the language of the ordinance, no lawful

or innocent act would subject a person to the penalty provided for therein. In other words, it is held that the law will be rationally applied, and that cases of innocence will be excepted from its terms, and that before a valid conviction can be had, the prosecution will be compelled to show, in addition to the fact of the "visit," that something was done by the "visitor," showing a guilty or unlawful purpose, and thus bringing him within the class intended to be denounced by the ordinance.

Citing; *Ex Parte Lorenzen*, 128 Cal., 439.
U. S. vs. *Kirby*, 7 Wall., 482.
Ex Parte McClain, 134 Cal., 111.
People vs. *Mead*, 28 Cal. Decisions, 861.

The last case cited is the latest expression of opinion by the State Supreme Court, and it holds that the prosecution must both allege and prove a guilty purpose though the statute is silent upon the subject of intent.

In this condition of the law there can be no valid conviction of an innocent visitor, even though the ordinance be general in its terms and does not expressly exclude from its operation the cases of persons innocently or lawfully visiting. If therefore, as Plaintiff in Error contends, the evidence taken at his trial showed nothing more than that he was an innocent visitor, his remedy is by appeal from the judgment of conviction, and hence his application for the Writ of Habeas Corpus is without justification in law.

"The Writ of Habeas Corpus does not extend be-
"yond the question or jurisdiction and the validity of
"the process upon its face * * *; the Writ cannot
"be substituted for an appeal for the review of errors
"in the misapplication of the law to any given state of
"facts, or in determining whether the evidence taken
"at the trial was sufficient to bring the case within the
"terms of the ordinance prohibiting the offense
"charged."

Ex Parte Long, 114 Cal., 159.

To the same effect are the following:

Ex Parte Watkins, 3 Pet., 203.
In re Wilson, 140 U. S., 583.
In re Delgado, 140 U. S., 588.

Counsel contends that plaintiff in error is "deprived
"of his liberty without due process of law, in violation
"of the Federal Constitution, because his conviction is
"based upon evidence showing him to be innocent of
"any guilty purpose." Conceding that the evidence does show this, the judgment of conviction being erroneous, would be set aside by the tribunals of the State under the proper proceedings, for, as shown above, the ordinance is neither construed nor applied in such a manner as to permit the conviction of a person innocent of a wrongful intent. There is therefore no Federal question involved, but only a mere error in the application of the law, and the object of the jurisdiction

of this Court in controlling decisions of State Courts is not to correct mere errors.

Remington Paper Co. vs. *Watson*, 173 U. S., 451.
Central Bank Co. vs. *Laidly*, 159 U. S., 111.

3. The other point presented in the brief of counsel is that the ordinance in question is unconstitutional because it is enforced against Chinese only. It may be that as far as is known the Chinese are the only persons who have thus far violated this ordinance, but the statement of counsel is misleading and not true in fact, and no stipulation was ever made admitting its truth. The subject was never even hinted at the Hearing on the Writ of Habeas Corpus, and hence the point involved never presented. The Court will understand that under the California practice the Petition for Writ of Habeas Corpus is not served upon the respondent and constitutes no part of the pleading considered at the Hearing. The point was therefore not before the Court in the pleading; neither was it suggested orally by counsel.

The cases are all unanimous in holding that the Federal question must be presented to and ruled upon by the State Court before this Court will take jurisdiction by writ of error.

"It is well settled law that to give this Court juris-
"diction of a writ of error to a State Court, it must af-
"firmatively appear, not only that a Federal question
"was presented for decision by the State Court, but

"that its decision was necessary to the determination "of the cause."

Eustice vs. *Bolles*, 150 U. S., 361.
Beales vs. *Cone*, 188 U. S., 184.
Howell vs. *Brunswick Co.*, 150 U. S., 440.
Harrison vs. *Morton*, 171 U. S., 47.

4. It is likewise well settled that "though the Fed- "eral question was raised, it must appear that the de- "cision was not or could not have been made under "rules of general jurisprudence, broad enough in them- "selves to sustain the judgment without considering "the Federal question."

Missouri Pac. Railway vs. *Fitzgerald*, 160 U. S., 576.
New Orleans vs. *N. O. Water Works Co.*, 142 U. S., 84.
Delaware City Nav. Co. vs. *Reybold*, 142 U. S., 643.
Chappel Chem. Co. vs. *Sulphur Mines Co.*, 172 U. S., 471.

As to the point made by counsel that the evidence at the trial of plaintiff in error did not show him to be guilty, the judgment of the Superior Court discharging the Writ of Habeas Corpus is sustained by the rule that plaintiff's remedy lay in an appeal and not by Writ of Habeas Corpus; and again, as to that question, and to

every Federal question which might possibly be raised, the judgment of the Superior Court in discharging the Writ is fully sustained and justified by the general rule of law that the applicant must be under actual restraint before he may have recourse to the Writ of Habeas Corpus.

Respectfully submitted,

L. F. BYINGTON,

District Attorney.

I. HARRIS,

Counsel for Defendant in Error.

Supreme Court of the United States.

No. 245.—October Term, 1904.

Ah Sin, Plaintiff in Error, *vs.* George W. Wittman, as Chief of Police of the City and County of San Francisco, California.	In error to the Superior Court in and for the City and County of San Francisco, State of California.

[May 29, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

Error to the judgment of the Superior Court of the city and county of San Francisco, State of California, discharging a writ of *habeas corpus*.

Plaintiff in error filed a petition in said court, alleging that he was a subject of the Emperor of China, and was restrained of his liberty by defendant in error, who was the chief of police of the city and county of San Francisco, under a judgment of imprisonment rendered in the police court of said city for the violation of one of its ordinances. The ordinance is as follows:

"Prohibiting the exposure of gambling tables or implements in a room barred or barricaded or protected in any manner to make it difficult of access or ingress to police officers, when three or more persons are present; or the visiting of a room barred and barricaded or protected in any manner to make it difficult of access or ingress to police, in which gambling tables or implements are exhibited, or exposed, when three or more persons are present.

"Be it ordained by the people of the city and county of San Francisco as follows:

"Sec. 1. It shall be unlawful for any person within the limits of the city and county of San Francisco to exhibit or expose to view in any barred or barricaded house or room, or in any place built or protected in a manner to make it difficult of access or ingress to police officers when three or more persons are present, any cards, dice, dominoes, fan-tan table or layout, or any part of such layout, or any gambling implements whatsoever.

"Sec. 2. It shall be unlawful for any person within the limits of the city and county of San Francisco to visit or resort to any such barred or barricaded house or room or other place built or protected in a manner to make it difficult of access or ingress to police officers, where any cards, dice, dominoes, fan-tan table or layout, or any part of such layout, or any gambling implements whatsoever are exhibited or exposed to view when three or more persons are present.

"SEC. 3 Every person who shall violate any of the provisions of this ordinance shall be deemed guilty of misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed five hundred ($500.00) dollars, or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

"SEC. 4. This ordinance shall take effect and be in force on and after its passage."

The complaint in the police court charges a violation of the ordinance by the plaintiff in error. The petition for writ of *habeas corpus* alleges that the ordinance violates section one of the Fourteenth Amendment of the Constitution of the United States, in that it deprives plaintiff in error of the equal protection of the laws, because it is enforced solely and exclusively against persons of the Chinese race, and in that it "unjustly and arbitrarily discriminates in favor of certain visitors and also in favor of certain persons resorting to the house, room or place referred to in said ordinance, as well as in favor of such persons and visitors as resort to or visit such house or room or place when not barred or barricaded or protected in a manner to make the same difficult of access or ingress to police officers." These objections, it is alleged, were made by him in the police court and overruled.

The petition also alleges that plaintiff in error is, by the ordinance, deprived of his liberty without due process of law, in that he is prohibited thereby from visiting, innocently and for a lawful purpose, the house or room or place mentioned in said ordinance.

It is also alleged that the ordinance is in contravention of the treaty between the United States and China.

Upon filing the petition a writ of *habeas corpus* was issued, returnable before the court on the 22d of March, 1904, and petitioner admitted to bail in the sum of $10.

The following is the order of the court dismissing the writ and remanding the petitioner to custody:

"This matter came on regularly for hearing this 28th day of March A. D. 1904, the petitioner being represented by his counsel and the people being represented by the district attorney; whereupon it was stipulated and agreed in open court by counsel for the people and by counsel for the petitioner that the facts are as set forth in the petition on file herein for the writ of *habeas corpus*. The cause was then argued by counsel on the points stated in the said petition and was thereupon submitted to the court for its decision and judgment; and the court being fully advised in the matter does now upon the authority of *The matter of Ah Cheung*, (136 Cal. 678,) dismiss the writ of *habeas corpus* heretofore issued herein and remand the petitioner to the custody of the chief of police of the city and county of San Francisco. Ordered accordingly. The petitioner reserved an exception to the judgment."

Plaintiff in error's petition presents the question of the constitutionality of the ordinance under which he was convicted. Section one makes it

unlawful for any person to exhibit any gambling implements whatsoever in any "barred or barricaded house or room or other place built or protected in a manner to make it difficult of access or ingress to police officers, where any cards, dice, dominoes, fan-tan table or layout, or any part of such layout, or any gambling implements whatsoever, are exhibited or exposed to view when three or more persons are present."

Section two makes it unlawful to visit or resort to such barricaded house or room.

The ordinance received consideration in the matter of Ah Cheung by the Supreme Court of the State of California. (136 Cal. 680.) It was decided that it refers "only to places which are specially barred and barricaded against entrance by officers of the law, so that illegal gambling may be protected from discovery. Rightly construed, the words 'barred and barricaded' do not include an ordinary private residence or room, where doors are sometimes locked or bolted in the ordinary method. Neither should it be construed to mean an attempted prevention of ordinary innocent games played with cards, dice or dominoes."

The suppression of gambling is concededly within the police powers of a State, and legislation prohibiting it, or acts which may tend to or facilitate it, will not be interfered with by the court unless such legislation be a "clear, unmistakable infringement of rights secured by the fundamental law." (*Booth* v. *Illinois*, 183 U. S. 425, 429; *Otis* v. *Parker*, 187 U. S. 606.) As interpreted by the Supreme Court of the State, the ordinance cannot be so characterized.

It is contended that the ordinance makes criminal "the mere act of innocently visiting such a house or room where the visitor had no knowledge and nothing whatever to do with the barring or barricading of the premises or the prescribed articles." It is hence contended by plaintiff in error that "he is deprived of his liberty without due process of law, in that he is prohibited thereby from visiting, innocently and for a lawful purpose, the house or room or place mentioned in said ordinance." Granting, for argument's sake, that one might visit innocently a barred or barricaded house or room where gambling implements are exhibited or exposed to view, and, if as plaintiff in error alleges in his petition, that he was convicted, notwithstanding he established that he had innocently visited the house mentioned in the charge against him, we are not at liberty to declare the ordinance unconstitutional. Besides, his remedy for that ruling was not by *habeas corpus*. It was by appeal to the Superior Court, which the Penal Code of the State gave him. We may observe he could have raised on such appeal the questions he now raises and have them reviewed by this court.

Plaintiff in error avers "That said ordinance and the provisions thereof are enforced and executed by the said municipality of San Francisco, and

said State of California, solely and exclusively against persons of the Chinese race, and not otherwise." The contention is that Chinese persons are thereby denied the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States. *Yick Wo* v. *Hopkins*, (118 U. S. 373,) is cited to sustain the contention. And, it is further contended that the fact of a partial execution of the ordinance is admitted by the order of the Superior Court, wherein it is recited that upon the presentation of the case "It was stipulated and agreed in open court by counsel for the people and by counsel for the petitioner that the facts are as set forth in the petition on file herein for the writ of *habeas corpus*." There is a misunderstanding between counsel as to what was intended by the stipulation. Counsel for defendant in error contends it was not intended to admit a discrimination in the administration of the law, but to submit the case on such facts as would test and cause a review of the matter of Ah Cheung, *supra*. This seems to be supported by the order of the court taken as a whole, and it is the understanding of the court we are to ascertain. In other words, we are to ascertain what questions of law and fact were submitted to the court. It cannot be certainly said that the court regarded the fact of discrimination to have been admitted, for it rested its decision on the authority of the Cheung case. The court indeed may have regarded the allegation of the petition as lacking in certainty of averment, and hence not bringing the case within the ruling of the Yick Wo case. That case concerned the use of property for lawful and legitimate purposes. The case at bar is concerned with gambling, to suppress which is recognized as a proper exercise of governmental authority, and one which would have no incentive in race or class prejudice or administration in race or class discrimination. In the Yick Wo case there was not a mere allegation that the ordinance attacked was enforced against the Chinese only, but it was shown that not only the petitioner in that case, but two hundred of his countrymen, applied for licenses, and were refused, and that all the petitions of those not Chinese, with one exception, were granted. The averment in the case at bar is that the ordinance is enforced "solely and exclusively against persons of the Chinese race and not otherwise." There is no averment that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced. No latitude of intention should be indulged in a case like this. There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the State, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the Yick Wo case,

but that it was made so by the manner of its administration. This is a matter of proof, and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a State.

We think, therefore, the judgment of the Superior Court should be and it is hereby

Affirmed.

Mr. Justice PECKHAM dissents.

True copy.

Test:

Clerk Supreme Court, U. S.